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## Commentary: A Response to Professor Damaška

### Understanding Responses to Hearsay: An Extension of the Comparative Analysis

Dale A. Nance\*

For some time now, Professor Damaška has been giving us considerable help in refining our understanding of the purposive character of Anglo-American and Continental procedural law.<sup>1</sup> In his valuable contribution to this symposium, he advances our understanding of the purposes of hearsay rules and practices by describing and explaining Continental responses to the hearsay problem and comparing them with the familiar Anglo-American exclusionary rule.<sup>2</sup> He proceeds by first contrasting the procedural contexts of Anglo-American and Continental law in which hearsay problems arise, and then elucidating some of the history of Continental responses to hearsay.

Let me say at the outset that I agree with Damaška's claim, amply illustrated in his historical survey, that the epistemic dangers of reliance upon hearsay have long been familiar to policy makers in both systems, and that the comparative task is to understand the distinctive responses to those dangers elicited in each.<sup>3</sup> If there is a weakness in Damaška's paper, it is the

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1. See generally MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

2. Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425 (1992).

3. Implicit is the premise that the regulation of the use of hearsay is designed primarily to improve the accuracy of fact-finding. This is a widely accepted starting point, one with which I agree, but from which others have dissented. See, e.g., Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 LAW & PHIL. 333 (1989) (challenging accuracy as the basic goal of the Anglo-American hearsay rule; suggesting instead the intrinsic desire of decision-makers to get as close to the evidence as possible, whether or not that improves accuracy).

failure to develop more fully a coherent rationale, however tentative or approximate, for the exclusionary response itself. Without such a rationale, it is difficult to accomplish Damaška's stated goal of clarifying the distinctiveness of Anglo-American practices. I propose, therefore, to explore some of the steps toward such a rationale and to relate them to Damaška's analysis in order to amplify his comparative insights.

## I. INTERPRETING THE HEARSAY RULE: OF TAINT THEORIES AND INDUCEMENT THEORIES

In the opening paragraph of his paper, and throughout the following discussion, Damaška emphasizes the derivative character of hearsay.<sup>4</sup> That is, hearsay is epistemically inferior to the testimony of the original declarant, not to other admissible evidence generally.<sup>5</sup> While the probative weakness of much evidence is unavoidable, the weakness of hearsay (as such) is correctable, in principle and often in practice; its correctability lies in the unelaborated background of the standard instances of hearsay.<sup>6</sup> This generates a preference for the testimony of the declarant even when the probative value of the hearsay alone is quite high.<sup>7</sup> However, the preference for original testimony itself does not provide a complete rationale for exclusion of the hearsay. One could, after all, use both, a point Damaška readily

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4. Damaška, *supra* note 2.

5. Much paradigmatic hearsay has high probative value but is nonetheless excluded, such as prior, cross-examined testimony by a person available to testify at trial. Cf. FED. R. EVID. 804(b)(1) (exceptional admissibility of prior testimony of unavailable declarant). This is not to say that hearsay is unique in its derivative character. For example, the exclusion of secondary evidence of the contents of a document is based upon its epistemic inferiority relative to the original document. See, e.g., FED. R. EVID. 1002 (requiring original of writings, recordings, or photographs).

6. Of course, the *prima facie* prohibition of hearsay, as usually defined, is broad enough to sweep within its grasp cases where the original declarant is unavailable. See, e.g., FED. R. EVID. 801(a)-(c) (defining hearsay). But this is not inconsistent with the idea that the reason behind exclusion is the presupposed availability of the declarant in paradigmatic cases.

7. Again, where the definition of hearsay derives from standard cases, the sweep of an exclusionary rule based upon such a definition may be broader than appropriate in terms of such a preference for the declarant's testimony. This overbreadth leads naturally to the development of exceptions, not predicated upon the declarant's unavailability, for those special contexts in which the hearsay may be considered at least as reliable as the declarant's testimony or in which the costs of presenting the declarant are not considered worth the modest epistemic improvement. See, e.g., FED. R. EVID. 803 (exceptions to hearsay prohibition that are not conditioned on the declarant's unavailability).

acknowledges.<sup>8</sup>

So we must go beyond anything that Damaška explicitly states and distinguish between two general lines of argument that might, in principle, complete the argument for an exclusionary rule. Let  $E$  represent the total package of evidence upon which the fact-finder would make its decision except the hearsay,  $H$ , and the testimony of the hearsay declarant,  $T$ . The two lines of argument differ in terms of the comparison that is set up in considering exclusion of  $H$ .

On the one hand, exclusion could be justified by the claim that the goal of accuracy is better served by limiting the fact-finder to reliance upon  $E$  than by allowing reliance upon  $E+H$ . According to this *taint* theory, the risks of misvaluation associated with the derivative nature of  $H$  so affect decision making that the tribunal's consideration of  $H$  is at least as likely to result in more erroneous verdicts as it is more accurate ones. Such a theory suppresses the significance of hearsay's correctness; the presence or availability of  $T$  is largely irrelevant to the question of  $H$ 's admissibility.<sup>9</sup> The most common Anglo-American form of this argument, which obviously requires some filling out, stems from a distrust of lay jurors' fact-finding capacities.<sup>10</sup> By focusing on the use of lay jurors, the compara-

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8. Damaška, *supra* note 2, at 446. In this connection, one obvious ground of exclusion may be acknowledged and set aside. If the nonderivative testimony is presented, hearsay that essentially repeats the declarant's testimony should be excluded in accord with the policy (important to both Anglo-American and Continental courts) that the resources of the tribunal and the parties be conserved. See, e.g., FED. R. EVID. 403 (discretionary exclusion of cumulative evidence). The policy generally comes into play only after the declarant has testified and only where it is less time-consuming to determine that the hearsay is in fact redundant than simply to consider it "for what its worth." Consequently, this is but a minor factor for explaining or justifying the use of the exclusionary rule, at least in its present form. By the same token, some hearsay has extremely low probative value and could be excluded as a waste of time, but our broad exclusionary rule cannot be explained only by reference to such cases.

9.  $H$  will be considered misleading even if the declarant testifies; the taint attaches to  $H$  and can be avoided by its exclusion. Likewise, it will be considered irrelevant whether the exclusion of  $H$  causes the evidence to shift to  $E+T$ ; if the exclusion of  $H$  results in the consideration of  $T$ , that is a fortunate side effect, but even if it does not, the net result is an improvement.

10. As a first cut, a superior fact-finding acumen of professionals would be the premise of an argument against the use of lay juries, not of an argument against the use of hearsay in jury trials. The premise of a taint argument for the exclusion of hearsay in jury trials must be a claim that jury fact-finding, unlike judge fact-finding, is less accurate if hearsay is admitted (perhaps subject to cautionary instructions) than if it is excluded. Moreover, even if one abandons the claim of professional superiority and argues that hearsay is

tive thesis becomes: The relative absence of the exclusionary rule on the Continent is attributable to the lesser employment of juries there.<sup>11</sup>

On the other hand, the rationale of exclusion may be tied to its effect on the juridical consideration of *T*. That is, since the derivative nature of hearsay points directly to the epistemic superiority of *E+T* over *E+H*, the rationale of exclusion of *H* can be based on the judgment that exclusion will induce the tribunal's consideration of *T*. *E+T* is thought to be better than *E+H* even though *E+H* might be better than *E* alone. This *inducement* theory depends crucially upon considerations of the absence and availability of *T*, since exclusion will fail of its point if *T* is unavailable or already before the court.<sup>12</sup> This stands in sharp contrast with a taint theory.<sup>13</sup>

The most common Anglo-American form of inducement theory posits that exclusion serves to put pressure on the parties to present the better form of evidence.<sup>14</sup> For example, a litigant may well prefer to present *H* instead of *T*, but if that option is foreclosed by an exclusionary rule, the litigant may

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tainted for either judge or jury, the thesis still rests upon a comparison of accuracy with and without the hearsay, *ceteris paribus*. In other words, it is not enough to show that there is a serious risk of overvaluing hearsay, if that is in fact the case, *see infra* note 18; the risk must be so great as to outweigh the risk of inaccuracy resulting from the loss of the excluded hearsay's probative value.

11. This has long been a standard line of argument. *See, e.g.*, Robert E. Ireton, *Hearsay Evidence in Europe*, 66 U.S. L. REV. 252, 252-53 (1932).

12. Note that the degree of certainty of inducement required to warrant exclusion may be an increasing function of the probative value of *H*. For example, a minimal probative value in *H*, not sufficiently misleading as to generate taint, might still render *H* expendable in preference to a relatively small probability of inducing the presentation of *T*.

13. One might argue that the taint associated with *H* is somehow dissipated in the presence of *T*, but it is very difficult to imagine a plausible argument that the taint of *H* is somehow affected by whether or not the (absent) *T* is available to be presented to the trier of fact. Thus, the existing structure of rules seems incompatible with a taint theory in allowing presentation of *H* in many situations where *T* is unavailable, yet the same structure may seem incompatible with an inducement theory in that those situations are so limited in scope. *See, e.g.*, FED. R. EVID. 804(b)(1)-(4) (specific exceptions to hearsay prohibition that are conditioned on declarant's unavailability). *But see* FED. R. EVID. 804(b)(5) (residual discretion to admit if declarant unavailable).

14. *See, e.g.*, George F. James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 795-97 (1940). It is worth noting that the preferred evidence may not always be *T* itself; in some contexts, admission may be conditional upon, and thus serve to induce, the presentation of other evidence concerning the circumstances of the declaration or the credibility of the declarant. *See* Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987).

still prefer to present *T* rather than have neither form of evidence before the trier of fact.<sup>15</sup> By focusing on party control over evidence presentation, the comparative thesis becomes: The relative absence of an exclusionary rule on the Continent is attributable to the greater judicial control over evidence gathering and sifting under civil law procedures.<sup>16</sup>

The relative importance of these two general lines of argument has long been debated and is, in fact, part of a larger debate about the rationale of the great bulk of Anglo-American admissibility rules, other than privileges.<sup>17</sup> Each theory has burdens to overcome. The difficulty for a taint theory is explaining why being exposed to admittedly relevant information, which may be very probative, should lead to greater inaccuracy, especially when the information carries on its face a consumer warning, as it were, by virtue of its derivative status.<sup>18</sup> The difficulty for an inducement theory is explaining why exclusion is necessary, given that an opponent can, with the possible assistance of the court, seek out and present *T*.<sup>19</sup>

To be sure, a full explanation of our complex practices in regard to hearsay is very likely more complicated than is revealed by reliance upon either of these theories alone. In particular, one could subscribe to both types of argument without necessarily falling into inconsistency. Indeed, one might coher-

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15. Of course, such a theory must be fleshed out by considering the absolute and relative access of the parties to the declarant, and whether exclusion of proffered evidence is the optimal way to exert the needed pressure. See Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831 (1991).

16. See, e.g., H.A. Hammelmann, *Hearsay Evidence, A Comparison*, 67 LAW Q. REV. 67, 67-68 (1951).

17. Compare JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (Boston, Little, Brown, & Co. 1898) (attributing greatest significance to the use of lay juries), with Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937) (attributing greatest significance to party control of evidence gathering and presentation).

18. For a succinct discussion and review of the available empirical information with regard to lay evaluation of hearsay, see Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992) (a survey of empirical evidence suggests that jurors seriously discount hearsay, often to the point of ignoring it entirely).

19. In terms of the larger debate, I find the obstacles confronting a taint theory to be more difficult to surmount than those confronting an inducement theory. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988). Being skeptical of exclusionary rules, I do not mean to imply that an inducement theory can, in the final analysis, justify the hearsay rule as it now operates or, indeed, justify other non-privilege exclusionary rules best interpreted by such a theory. See *id.* at 296.

ently hold  $E+T$  to be better than either  $E$  or  $E+H$ , in terms of generating accurate verdicts, and simultaneously consider  $E$  to be better in these terms than  $E+H$ . In that case, exclusion could be grounded on the taint of  $H$  as well as the anticipated inducement of  $T$ . For such a view to work as a justification of exclusion, however, one must overcome the obstacles facing each kind of theory, though perhaps in somewhat muted forms.<sup>20</sup> In any event, the history of the Anglo-American hearsay rule can be seen in terms of the complex interaction between these two theories in the explanation and interpretation of the rule.<sup>21</sup> It is important, therefore, to try to comprehend the relative importance of the two approaches, both from an historical perspective and as a matter of justification.<sup>22</sup>

## II. COMPARATIVE PROCEDURE: THE CONTEXT OF HEARSAY

Consider now the relationship of Damaška's analysis to the

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20. The difficulty concerns those cases where a taint theory would seem to require exclusion but an inducement theory would not, or vice versa. The most plausible form of combination of the two theories is one that is disjunctive, requiring exclusion when either  $E$  is better than  $E+H$  (taint) or  $T$  is better than (and can be expected to be induced by the exclusion of)  $H$  (inducement). But one can also imagine the conjunctive requirement of exclusion if but only if  $E+H$  is better than  $E$  alone and  $T$  is better than (and can be expected to be induced by the exclusion of)  $H$ . The conjunctive approach would seem to make sense only because of doubts about the viability of either theory standing alone, coupled with a default preference for the admissibility of relevant evidence. Cf. Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153 (1990).

21. Even among those who seem to recognize these two themes, it is usually unclear to what extent they are seen as distinct theoretical foundations of the hearsay rule. See, e.g., Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 378 (1992) ("The central premise of the hearsay doctrine is that live testimony is preferable to remote statements. This premise and the corollary that juries cannot properly appraise remote statements are largely unsupported by empirical evidence.").

22. In this effort, we must try to avoid being prematurely distracted by second-order considerations that undoubtedly affect the details of hearsay doctrine. See Nance, *supra* note 19, at 281-84 (arguing that inducement theory is the dominant rationale behind both oath and cross-examination rules and, therefore, behind hearsay rules, but recognizing a degree of historical influence of the taint theory in the details of hearsay doctrine). In particular, both taint and inducement theories are, in the first order, theories about the rationale of exclusion. The judgments involved in each need not be limited to the case at hand, but may be a "long run of cases" kind of calculation. What is implicated here is the distinct judgment about whether to operate by ad hoc, case-specific rulings, usually called "discretionary," or by way of rules that apply to general classes of cases, an issue distinct from that of whether to respond to hearsay with exclusion or in some other way.

two types of theoretical foundation for the hearsay rule. Following Damaška's approach, I will look first at the features of procedural background that he considers relevant to the differentiation of common law and civil law responses to hearsay.

#### A. UNITARY VERSUS BIFURCATED DECISION-MAKING RESPONSIBILITY

The first factor Damaška discusses is that Continental systems, even when using lay persons as fact-finders, do not bifurcate responsibilities as is done in Anglo-American jury trials.<sup>23</sup> Damaška clarifies that the significance of this difference lies not in the relative accuracy of lay and professional fact-finders, but rather in the procedural arrangements that bifurcation makes possible. In a bifurcated process, the fact-finder, whether lay or professional, can be shielded from hearsay by the other decision maker. In unitary systems, to exclude hearsay evidence from the consideration of persons who have already, unavoidably perceived it would require them to "reason in ways distinct from ordinary models of cognition."<sup>24</sup>

Arguing the importance of bifurcation seems to confirm a taint theory of exclusion by emphasizing the importance of shielding the trier of fact from the tainted evidence.<sup>25</sup> How-

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23. Damaška, *supra* note 2, at 426-28.

24. *Id.* at 428. Bifurcation may make the exclusion of hearsay more plausible, but it does not motivate it. A proponent of exclusion on other grounds can say, "We can avoid this distortion problem by bifurcating responsibilities." But bifurcation does not provide an argument in favor of exclusion in the first place. To be sure, Damaška does not claim that bifurcation motivates exclusion. He seems rather to claim only that, whatever motivates exclusion carries less weight in the unitary systems of the Continent where it is subject to the counterargument based on cognitive distortion.

25. Damaška recognizes that the importance of this factor must not be exaggerated, since Anglo-American juries are routinely exposed to hearsay that is ruled inadmissible. *Id.* at 428 n.3. To this concession should be added several more. Out-of-court statements are often admissible for a limited (nonhearsay) purpose. See, e.g., FED. R. EVID. 105. Moreover, hearsay exclusions are routinely employed in "unitary" Anglo-American bench trials, though perhaps not as strictly. Of course, these points may indicate only that Anglo-American policy is to demand more "extraordinary" reasoning in the courtroom, but that policy itself would call for further explanation. Perhaps, instead, the exclusion of already heard hearsay serves merely, in practice, as a kind of cautionary device, warning the trier of fact and the parties not to place important reliance upon the evidence in question. Moreover, it is not necessarily true, either in unitary or bifurcated systems of decision making, that a rule excluding hearsay would require extraordinary reasoning by the tribunal as to each item of inadmissible hearsay evidence. "Pretend you didn't hear that" issues arise only with respect to hearsay that is presented to the tribunal and then excluded. The problem will not arise if the person who decides



ever, shielding may also be considered useful, though not essential, under an inducement theory, by preserving the pressure on litigants to present the declarant's testimony. It does this by reducing the temptation for the litigant to try to circumvent the exclusionary rule by injecting hearsay despite an anticipated adverse admissibility ruling. This temptation, which is plausible only within a system of adversarial control over the presentation of evidence, may exist even if we are confident that there is, in fact, no taint associated with the hearsay. By presenting only *H*, the proponent can induce the trier of fact to rely, in an epistemically rational way, on *H* rather than the *T* the law prefers.<sup>26</sup>

## B. EPISODIC VERSUS CONTINUOUS PROCEEDINGS

Damaška next observes that the Continental use of piecemeal proceedings allows the tribunal time to seek out and interrogate the hearsay declarant whose statement is reported to the tribunal by someone else, or at least to collect information about the credibility of an unavailable declarant. This is contrasted with the one-shot "day-in-court" methodology of Anglo-American trials, the implication being that in the latter context comparatively little opportunity for such follow-up examination is available.<sup>27</sup> Here, the expressed concern speaks more to an inducement theory than a taint theory, since the primary point of differentiation concerns the comparative capacity of the two systems to generate additional information without the aid of an exclusionary rule, rather than any difference in the perceived usefulness of the hearsay itself.<sup>28</sup>

Of course, witness interrogation in Anglo-American litiga-

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whether or not to present the evidence chooses not to do so because of the existence of the exclusionary rule. In other words, to the extent that the rule is effectuated without rulings made in the presence of the fact-finder, there is no such risk of cognitive distortion.

26. This assumes only that the proponent believes there to be a sufficiently high probability that the trier of fact will consider *H* rather than ignore it pursuant to judicial instruction. See generally J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 76-78, 86-87, 95-99, 106-11 (1990) (admonishing instructions are generally ineffective, if not counterproductive).

27. Damaška, *supra* note 2, at 428-29.

28. As a part of the discussion of piecemeal proceedings, Damaška also addresses the greater willingness of Continental appellate courts to review the factual bases of decisions made below. *Id.* at 429-30. He argues that this fact decreases the need to monitor the reliability of the evidence with which the fact-finder works. This plausible claim depends upon a judgment that exclusion enhances reliability of the net evidentiary input, but it does not depend

tion is a one-shot affair only if one limits consideration to interrogation before a trier of fact. In the broader context of litigation, including the use of pretrial discovery, it is doubtful that there is greater difficulty seeking out and interrogating hearsay declarants in the Anglo-American system. This counterargument is obviously less convincing the weaker the system of discovery that is in place. Since the discovery system was decidedly weaker in the eighteenth and nineteenth centuries, when the rule excluding hearsay was being developed, the factor under discussion is more significant as historical explanation than as continuing justification of institutional differences, a point Damaška readily acknowledges.<sup>29</sup>

Insofar as we are also concerned with the continuing justifiability of the Anglo-American exclusionary rule, and insofar as we are concerned with finding an explanation for its continued employment that does not rest merely upon institutional inertia, the point would rather have to be that modern common-law systems of litigation, with all applicable discovery mechanisms but no exclusionary rule, are less effective in bringing the hearsay declarant's testimony to judicial cognizance than Continental procedures. This, however, has more to do with the extent of judicial control over evidence gathering and presentation than with the episodic nature of the proceedings.<sup>30</sup> Damaška's second distinguishing feature merges into the third.

### C. INQUISITORIAL VERSUS ADVERSARIAL EVIDENCE PROCESSING

Gathering, sifting, and sorting information are inherently episodic aspects of decision making. The important question is who actually performs these tasks. The relevant contrast to be considered is between an episodic proceeding largely within the control of litigants and one largely within the control of the judiciary. Damaška rightly describes the general consequences of

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upon the answer to the question of how that is so. It therefore sheds little light upon the underlying theoretical basis of the exclusionary response.

29. *Id.* at 430.

30. Damaška refers to the fact that Anglo-American judges are reluctant to grant adjournments for the purpose of finding and calling hearsay declarants, as this is considered inconsistent with the idea of a continuous trial. *Id.* at 430 n.10. This idea is less significant than an appraisal of the adequacy of pretrial discovery and disclosure requirements; with pretrial disclosure of intended hearsay evidence, an opponent would not have to wait until the "day in court" to begin efforts to present the declarant in person.

placing this opportunity and responsibility in the hands of the litigants.<sup>31</sup> It gives somewhat greater reason to be concerned about the reliability of any given piece of evidence generated by the process than is true under a system more dominated by officials.

However, this feature applies across the board to evidence of all types, hearsay and nonhearsay. The standard defense of the adversarial approach is that any distortion created by one party can be countered by the opponent, decreased reliability of a given piece of evidence being offset by increased completeness of the aggregate of evidence presented.<sup>32</sup> The question, then, is whether this argument is significantly less convincing in the context of hearsay than that of other forms of evidence, and if so, why.

The relationship of this comparative feature to the underlying theoretical foundation is somewhat ambiguous. The risk of fabrication by adversaries resonates well with a taint theory, but only if detection of fabrication, or discounting for the residual risk thereof, is peculiarly difficult in the hearsay context. One can eliminate the risk of fabricated evidence of a given kind by excluding all evidence of that kind, but only at considerable cost.<sup>33</sup> On the other hand, by decreasing the probative value of hearsay, the risk of fabrication reduces the probability of inducing *T* that is needed to warrant exclusion under an inducement theory.<sup>34</sup> Moreover, fabrication aside, adversarial control over the decision whether to present (unfabricated) hearsay or the declarant's testimony presents obvious occasions for the application of an inducement theory.<sup>35</sup> Damaška may ultimately be right, therefore, to conclude modestly that this institutional difference merely suggests a more relaxed attitude toward hearsay in Continental jurisdictions, but I think it also tends to cohere better with an inducement theory than with a taint theory of exclusion.

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31. *Id.* at 430-34.

32. See Nance, *supra* note 19, at 234-35, 263-70 (discussing validity and limitations of the adversarial argument).

33. The most conspicuous experiment with such an approach, ultimately and wisely rejected, was the exclusion of the testimony of parties and other interested witnesses. See generally Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91 (1981-82) (common law); W. Ullmann, *Medieval Principles of Evidence*, 62 LAW Q. REV. 77, 81-82 (1946) (civil law).

34. See *supra* note 12.

35. See Damaška, *supra* note 2, at 432.

## III. CONTINENTAL RESPONSES TO HEARSAY

Damaška's survey of the historical development of Continental responses to hearsay is even more revealing with regard to the underlying theory motivating exclusion. On first thought, one might be inclined to say that there can be no such theory in civil law, for civilians do not "exclude" evidence: The parties do not present evidence that can then be ruled inadmissible. Given official control of evidence collection, juridical response *cannot* take exactly the same form as in an adversarial system. Of course, Damaška's main point is that there are Continental analogues to the exclusionary rule. He carefully assays the civilian responses, first as sufficiency rules under Roman-canon law, and later as directives, statutory or otherwise, indicating when a court may rely upon hearsay and when it is required to seek out the declarant for his or her testimony.<sup>36</sup> He thus clearly demonstrates the falsity of any claim that the civil law does not contain meaningful responses to the problem of hearsay evidence. Moreover, his demonstration raises the question of whether the same concerns that motivate the exclusion of hearsay evidence in adversarial systems motivate a different kind of response on the Continent, one more appropriate to inquisitorial procedures.

Damaška's discussion strongly suggests an answer to this question as well. As already noted, the theme of derivativeness recurs throughout the civilian tradition, indicating an affinity to classical common law views about not only hearsay, but also other doctrines, such as the original document rule, that Anglo-American thought subsumed under a general "best evidence" principle.<sup>37</sup> Implicit in the Roman-canon hostility toward "intermediaries,"<sup>38</sup> this affinity is explicit in the post-Enlightenment development of a "cognitive preference" for immediacy in the examination of evidence.<sup>39</sup> Such a preference is pointless if *T* is unavailable, so the availability of the declarant assumes central importance in deciding whether the cognitive prefer-

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36. *Id.* at 434-44 (Roman-canon responses); *id.* at 444-49 (post-reform responses). Beyond these kinds of measures, the only closer analogue to exclusion would be a requirement that the tribunal simply ignore hearsay that it encounters, other than as a lead to the development of the declarant's testimony. It is fairly obvious why this option was unacceptable; it would entail diverging significantly from ordinary models of cognition. *See id.* at 445-46; *see also infra* note 42 and accompanying text.

37. *See* Nance, *supra* note 19, at 248-56 (discussing common law doctrines).

38. Damaška, *supra* note 2, at 434-36.

39. *Id.* at 446-48.

ence needs to be backed by some particular official action, a point long recognized in Continental law.<sup>40</sup> In general, this kind of thinking is more consistent with an inducement theory of response, since it supposes a defeasible preference for *T* even when it cannot be denied that *E* + *H* would be a better package of evidence than *E* alone.<sup>41</sup> This conclusion is reinforced by the implicit civilian judgment that separating investigational authority from decision-making authority would not significantly contribute to accuracy of results.<sup>42</sup>

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40. *Id.* at 440 (Roman-canon law); *id.* at 440 (post-Enlightenment reforms). One can go back even further. Between the second and fourth centuries A.D., there developed a "free system of proof" in Roman law, including the "origins of the modern law of evidence" in both civil and common law jurisdictions. See Tony Honore, *The Primacy of Oral Evidence?*, in CRIME, PROOF, AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS 172, 174 (1981). That system included:

the general principle that a judge might insist on the better form of evidence being produced if it was available. Thus the emperor Hadrian, who was particularly interested in questions of evidence, replies to one of his provincial governors that he declines to allow a prosecutor to adduce written depositions before him instead of oral testimony [sic]. He therefore remits the case to the provincial governor in order that the latter should hear the witnesses, who are resident in his province, and form a conclusion as to their credibility. The emperor gives as his reason that he prefers to question witnesses personally.

*Id.* at 178 (footnote omitted). Observe that the emperor did not disapprove of the use of the depositions, but only their substitution for the usual in-court testimony of the declarant.

41. A complication arises in the context of sufficiency rules, as were employed in Roman-canon law. There are analogues to the inducement theory in the context of sufficiency rules; such rules sometimes induce a more complete presentation of evidence than the burdened party might otherwise choose to present. See Nance, *supra* note 15, at 846-50, 853-56. There is no plausible analogue to a taint theory in the context of sufficiency rules. The analogue would have to be some sort of rule requiring the adjudicator to infer the *opposite* of the proposition asserted by the hearsay declarant, whether or not the declarant is available to testify. Nevertheless, there are obviously good reasons, in the typical case, to give less weight to hearsay than would be given to primary testimony by the declarant. Moreover, one might fear that the trier of fact, or perhaps only lay jurors, would overvalue the hearsay evidence. This fear can plausibly lead to limitations on the sufficiency of evidence in which hearsay is important, even though one is not concerned that hearsay is more misleading than not having it at all (i.e., no taint), nor concerned with inducing the presentation of *T*. This accounts for the fact that Roman-canon thinking on sufficiency rules for hearsay was not informed solely by the best evidence principle, without thereby suggesting any element of taint theory. See Damaška, *supra* note 2, at 440-41 & n.44. This phenomenon can, of course, be seen at work in the modern use of cautionary instructions warning jurors against the overvaluation of admitted hearsay.

42. Damaška notes the possibility of such a bifurcated institutional arrangement, making it possible for one official to filter out hearsay from the

Damaška's observations about modern German criminal procedure confirm this association.<sup>43</sup> For example, the implications of an inducement theory include two important, first-order propositions that cannot easily be reconciled with a taint theory: first, relevant hearsay should be acceptable as evidence when the declarant is unavailable; and second, relevant hearsay should be acceptable as evidence when the declarant testifies. (Again, in neither case does a preference for *T* serve the purpose of inducing its presentation.<sup>44</sup>) Both propositions find ample support in the German treatment of hearsay. For example, Damaška tells us that, mainly as a consequence of the judge's duty, enforced on appeal, to justify reliance on derivative evidence, "hearsay witnesses . . . are usually called to testify only when primary witnesses are unavailable, or to supplement primary witnesses' testimony."<sup>45</sup> Despite certain convolutions associated with the use of records of prior judicial interrogation and the tradition of decision making based on written dossiers, essentially the same points apply in the context of written hearsay.<sup>46</sup>

In contrast, the common law's ambivalence toward hearsay from unavailable declarants is obvious: Canonical statements of the rule seem to say that sometimes, but by no means regu-

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evidence to be used by another in rendering judgment. He comments simply that the arrangement would be seen as "too costly and time-consuming." Damaška, *supra* note 2, at 445-46. To this difficulty may be added the subtle ways in which an official in charge of evidence collection will be inclined to slant the evidence toward his or her own view of the case when presenting evidence to a separate decision-maker.

43. Damaška observes that restrictions on the use of hearsay are greatly relaxed in the context of modern Continental civil procedure, though the judge's duty to justify the decision continues to discourage unnecessary reliance on derivative evidence. *Id.* at 446. This relaxation is coherent with an inducement theory, in that such an approach inherently entails balancing the costs of production of declarants against the seriousness of the controversy. In contrast, if hearsay is tainted, there is no good reason to tolerate its introduction in civil cases any more than in criminal cases.

44. Second-order considerations may complicate the analysis. For example, one might believe that hearsay from an unavailable declarant should, in principle, be admissible, yet refuse admission of hearsay derived from an allegedly unavailable declarant, because of doubts about the ability to make accurate judgments of availability in particular cases coupled with an a priori judgment that hearsay declarants are reasonably available most of the time. Alternatively, one might conditionally exclude *H* in order to induce presentation of evidence other than *T*, such as evidence of the circumstances surrounding the hearsay declaration. See *supra* note 14.

45. Damaška, *supra* note 2, at 453 (footnote omitted).

46. *Id.* at 436-39 (Roman-canon origins); *id.* at 449-52 (modern German practices).

larly, unavailability of the declarant will render the hearsay admissible.<sup>47</sup> A similar ambivalence can be observed with respect to hearsay statements made by subsequently testifying declarants, though this issue is rendered less pressing by the allowable uses of prior statements for impeachment and corroboration.<sup>48</sup> These tensions reflect the continuing influence of the taint theory of response. That influence is surely part of the explanation of American resistance to reform proposals that would have moved us closer to German practices.<sup>49</sup>

In the end, therefore, I take the principal contribution of Damaška's paper to be the demonstration that at least some Continental courts do respond seriously to hearsay evidence, and the underlying reason they do bears a much closer relationship to an inducement theory than to a taint theory of response. In this there may be something for Anglo-American lawyers to learn, for if we continue to cleanse the remaining elements of taint theory from our law of hearsay, we may be able to move our law in a more respectable direction.<sup>50</sup> Damaška has added further support for the view that this kind of change would not necessarily mean abandoning all restrictions on the use of hearsay.

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47. See *supra* note 13.

48. See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE §§ 34, 49, 251 (3d ed. 1984).

49. Note the similarities between those practices and the hearsay reforms proposed by Edmund Morgan in the Model Code of Evidence. In particular, the Code's Rule 503 would admit hearsay statements if the declarant testifies or is shown to be unavailable. MODEL CODE OF EVIDENCE Rule 503 (1942).

50. Richard Friedman makes a major contribution toward this goal in his paper for this conference, which, as a by-product of his decision-theoretic approach, carefully sorts the roles of taint and inducement and argues for the minimal role rightly afforded the former. See Richard Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992).